

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN CRUZ,

Defendant and Appellant.

G039918

(Super. Ct. No. 07CF2915)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed in part and reversed in part.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Melissa Mandel and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Juan Cruz of misdemeanor vandalism (Pen. Code, § 594, subd. (a)(1); all statutory references are to this code) and street terrorism (§ 186.22, subd. (a)) and found true an allegation he committed the vandalism for the benefit of a criminal street gang. (§ 186.22, subd. (d).) The court subsequently found true allegations defendant had one prior strike conviction (§§ 667, subds. (d) & (e)(2)(A), 1170.12, subds. (b) & (c)(2)(A)), two prior serious felony convictions (§ 667, subd. (a)(1)), and had served a prior prison term (§ 667.5, subd. (b).) It struck all but the two prior serious felony convictions and sentenced defendant to 11 years, 4 months in state prison, consisting of 16 months in state prison on count 1, vandalism committed for the benefit of a criminal street gang (§§ 594, subd. (a)(1), 186.22, subd. (d)), 16 months on count 2, street terrorism (§ 186.22, subd. (a)), to be served concurrently, and 5 years for each prior serious felony.

Defendant appeals contending the evidence is insufficient to support the felonious conduct element of the street terrorism count and the two prior serious felony enhancements should be stricken because neither count 1 nor count 2 are serious felonies. We agree. Defendant's conviction for street terrorism is reversed and the two prior serious felony enhancements are stricken. In all other respects, the judgment is affirmed.

FACTS

After defendant was seen writing graffiti outside of a market, police officers arrived and took him into custody. A gang expert testified defendant was a member of Los Compadres, a territorial, active criminal street gang with at least 50 members whose primary activities were serious assaults, including assaults with weapons, attempted murder, and driving stolen vehicles. By tagging the market, which was located in Los Compadres territory, defendant promoted and benefitted the gang by marking its territory "to instill fear in . . . the community and rival gang members."

DISCUSSION

1. Sufficiency of the Evidence to Support Street Terrorism Conviction

Section 186.22, subdivision (a) punishes “[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang” “Th[is] substantive offense . . . has three elements: Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive, . . . ‘knowledge that [the gang’s] members engage in or have engaged in a pattern of criminal gang activity,’ and . . . the person ‘willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.’ [Citation.]” (*People v. Lamas* (2007) 42 Cal.4th 516, 523.)

Defendant challenges only the third element, contending his street terrorism conviction must be reversed because there was insufficient evidence that he committed or aided and abetted a distinct and separate felony. He asserts the only conduct the prosecutor relied on to satisfy this element was the misdemeanor vandalism count, which does not suffice because “*Lamas* requires a ‘distinct’ felony, and none was proven here.” The Attorney General does not address the need for a distinct felony, instead responding that section 186.22, subdivision (d) automatically elevated the misdemeanor vandalism count into a felony, thereby satisfying the felonious conduct element of street terrorism. We do not reach these issues because we conclude the jury’s verdict finding defendant guilty of misdemeanor vandalism precludes the application of 186.22, subdivision (d).

“[S]ection 186.22[, subdivision] (d) prescribes an alternate penalty when the underlying offense is committed under specified circumstances” (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900.) It applies to “[a]ny person who is convicted

of a public offense punishable as a felony or a misdemeanor, which is committed for the benefit of, at the direction of or in association with, any criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd. (d).) Although the jury returned a true finding that defendant committed the vandalism “for the benefit of, or in association with, Los Compadres, a criminal street gang,” the question of whether the vandalism was “a public offense punishable as a felony or a misdemeanor” remained unanswered. We turn to that now.

Section 594, subdivision (b)(1) provides that where the damage caused by vandalism “is four hundred dollars (\$400) or more, [it] is punishable by imprisonment in the state prison or in a county jail not exceeding one year, or by a fine of not more than ten thousand dollars (\$10,000), or if the amount of defacement, damage, or destruction is ten thousand dollars (\$10,000) or more, by a fine of not more than fifty thousand dollars (\$50,000), or by both that fine and imprisonment.” But subdivision (b)(2)(A) of that section reads, “If the amount of defacement, damage, or destruction is less than four hundred dollars (\$400), vandalism is punishable by imprisonment in a county jail not exceeding one year, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment.” (§ 594, subd. (b)(2)(A).) In other words, vandalism is punishable only as a misdemeanor where the damage is less than \$400. (§§ 17, subd. (a); 594, subd. (b)(2).)

Here, the verdict form specifically states, “We the [j]ury . . . find the [d]efendant, Juan Cruz, [g]uilty of the crime of [m]isdemeanor, to wit: a violation of [s]ection 594[, subdivision] (a)(1) of the Penal Code of the State of California ([v]andalism), as charged in [c]ount 1 of the [i]nformation.” (Bold and capitalization omitted.) By expressly finding defendant guilty of a misdemeanor, the jury implicitly determined the amount of damage caused by his vandalism to be less than \$400, which is only punishable as a misdemeanor. Thus, because the crime was not “punishable as a

felony or a misdemeanor,” section 186.22, subdivision (d), by its very terms, does not apply.

The Attorney General does not suggest any conduct other than the vandalism combined with the section 186.22, subdivision (d) allegation satisfied the felonious conduct element for section 186.22, subdivision (a). The conviction for street terrorism is reversed.

2. Prior Serious Felonies

Defendant argues the two five-year enhancements under section 667, subdivision (a) should be stricken because neither the vandalism nor the street terrorism convictions qualify as a serious felony. The Attorney General “asserts the serious felony in this case was the [street terrorism] count, not tagging for the benefit of a criminal street gang.” Given that concession, our reversal of the street terrorism count, and the jury’s determination the vandalism was a misdemeanor, we agree with defendant there was no serious felony committed in this case that would allow imposition of the section 667, subdivision (a) enhancements.

Section 667, subdivision (a)(1) reads, “In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony . . . , shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.” Subdivision (a)(4) defines “serious felony” as “a serious felony listed in subdivision (c) of Section 1192.7.” (§ 667, subd. (a)(4).)

Under section 1192.7, subdivision (c)(28), a serious felony includes “any felony offense, which would also constitute a felony violation of Section 186.22[.]” But there was no felony violation of section 186.22 in this case. Consequently, the two enhancements under section 667, subdivision (a) are stricken.

DISPOSITION

Defendant's conviction on count 2 for street terrorism is reversed (see *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 72 [when conviction reversed for insufficient evidence, the defendant may assert double jeopardy claim to bar retrial]) and the two five-year enhancements under section 667, subdivision (a) are ordered stricken. The case is remanded for resentencing. In all other respects, the judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.